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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. [redacted] 234

CONTINENTAL OIL COMPANY,
Petitioner,

v.

STEWART L. UDALL,
Secretary of the Interior,
and
PHILLIPS PETROLEUM COMPANY AND
AZTEC OIL & GAS CO.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

Neither the Court of Appeals nor the District Court rendered an opinion in this cause. The District Court did enter certain Findings of Fact and Conclusions of Law (Joint Appendix, p. 165). The opinion of the Secretary of the Interior (Joint Appendix, p. 38) is officially reported in Decisions of the United States Department of the Interior. *Appeal of Continental Oil Company*, 68 I.D. 337 (1961).

JURISDICTION

Petitioner requests that a writ of certiorari be granted to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on February 10, 1967 (Appendix, p. A1). A petition for rehearing requested by Petitioner was denied by order dated March 15, 1967 (Appendix, p. A2). The jurisdiction of this Court rests on 62 Stat. 929, 28 U.S.C. § 1254(1)

QUESTIONS PRESENTED

In 1953 Petitioner was the high bidder for oil and gas leases on two tracts of unsurveyed land in the Navajo Indian Reservation. Each tract was described in the leases by metes and bounds and then went on to say that the tract "when surveyed probably will be described as follows:," thereafter enumerating certain sections. Notwithstanding the obvious meaning of these descriptions the Secretary of the Interior determined, as a matter of administrative discretion and in disregard of recognized legal standards, that the leases did not cover the lands described by metes and bounds but covered a lesser area of land delineated by the enumerated sections. The sections were determined by an official survey conducted after the lease sale.

Following this adverse determination by the Secretary, Petitioner brought an action for review under the Administrative Procedure Act in the United States District Court for the District of Columbia. When the Secretary submitted the administrative record to the court he included, over objection by Petitioner, certain interoffice memos and letters which did not comprise part of the administrative record, which were not made known to Petitioner during the administrative proceedings, and concerning which the Petitioner had no knowledge. The court overruled Petitioner's objection to inclusion of these materials.

On the basis of the foregoing, the following questions are presented:

(1) Whether the determination of the Secretary as to the lands covered by Petitioner's leases was in accordance with law as required by the Administrative Procedure Act.

(2) Whether the interoffice memos and letters were properly included as part of the administrative record for judicial review.

(3) Whether the Petitioner has been deprived of its property without due process of law.

STATUTES AND REGULATIONS INVOLVED

25 U.S.C. §§ 396a, 396b

"§ 396a. Leases of unallotted lands for mining purposes; duration of leases

On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. May 11, 1938, c. 198, § 1, 52 Stat. 347.

"§ 396b. Public auction of oil and gas leases; requirements

Leases for oil - and/or gas mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of

the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 463, 464-475, 476-478, and 479 of this title. May 11, 1938, c. 198, § 2, 52 Stat. 347."

25 C.F.R. § 171.8.

"§ 171.8[1] Lands to be in compact body.

The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys, except that leases covering lode ground may consist of one or more adjoining parallelograms 1,500 feet in length by 600 feet in width, as provided by the United States mining laws. No lease under the regulations in this part shall convey any extralateral rights, and no coal lease shall have a length exceeding 1 mile along the outcrop."

[1]"Prior to 1958, this regulation was numbered 186.8. See 25 C.F.R. § 186.8 (1949). This regulation has been in effect in this form since 1938."

Administrative Procedure Act
5 U.S.C. § 1009(e)

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or

applicability of the terms of an agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243."

Constitution of the United States
Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Under date of March 24, 1953, the United States Department of the Interior, Bureau of Indian Affairs, Window Rock Area Office, Window Rock, Arizona, advertised an oil and gas mining lease sale for Navajo Tribal lands in Arizona and Utah. This advertisement set forth the conditions of the sale and described the tracts to be leased. Where the lands were surveyed the tracts were described by official section, township and range. On unsurveyed lands the tracts were described by metes and bounds followed by a provision that the tract "when surveyed probably will be described as follows:", such provision then going on to enumerate certain sections. In some cases, the words "if surveyed" were used rather than "when surveyed" (Joint Appendix, pp. 16-29).

The advertisement further specified that certain conditions were to be incorporated in the leases (Joint Appendix, p. 18). Among these was one that provided in substance that the land was offered on a tract basis and that the acreage stated was for the purpose of computing rentals prior to survey and that thereafter rentals should be computed on the acreage shown by the survey. Another condition required that the lessee must have the leased premises surveyed by a registered land surveyor prior to drilling. These conditions were to be included in all leases whether the lands were surveyed or unsurveyed.

On May 1, 1953, Petitioner was the successful bidder on two tracts of unsurveyed lands involved in this cause. A predecessor of Phillips Petroleum Company and Aztec Oil & Gas Co. (herein referred to as "Phillips-Aztec") was the successful bidder on two unsurveyed tracts describing adjoining lands to the north.

On or about June 25, 1953, a group of the successful bidders at the lease sale requested that a public land survey be made by the Bureau of Land Management of most of the unsurveyed areas covered by the lease sale. Such survey was

to be of township boundaries only with section and quarter section corners established on the perimeter, but was not to include an interior section survey. This survey was made between August 7, 1953 and November 3, 1953 and was accepted and approved as an official survey May 10, 1954. Petitioner was one of the bidders who participated in the cost of the survey.

In September, 1956, Phillips-Aztec had a survey made by a private, registered land surveyor and filed plats of the survey with the appropriate departmental officials. Later in December, 1956, Petitioner had private surveys made which were also filed. These surveys covered the sections enumerated in the leases as indicated by the official township survey rather than the lands covered by the metes and bounds descriptions.

Shortly after filing such survey, Petitioner caused a well to be drilled on one of its leases, which well was completed as a producer in March, 1957, and comprised the initial discovery well in the White Mesa Field. In June, 1957, Phillips-Aztec commenced an offset well to the north. Meanwhile, in April, 1957, one of the companies holding leases in the area circulated to all other operators in the area a proposed agreement providing that where the metes and bounds description did not coincide with the sections indicated by the official survey, the indicated sections would control. This agreement was not executed by Petitioner.

Thereafter Petitioner proceeded to have new surveys made using the metes and bounds descriptions in its leases and plats were filed with the appropriate departmental officials. These metes and bounds descriptions covered the sections enumerated in Petitioner's leases, as indicated by the official survey, and also the south 624 feet of indicated sections 19, 20, 21 and 22 enumerated in the Phillips-Aztec leases. This strip of land, 624 feet wide and four miles long, contains approximately 300 acres and is the subject matter of this controversy. There is no conflict between the metes and bounds descriptions in Petitioner's leases and the metes and bounds descriptions in the Phillips-Aztec leases.

This matter came before the Secretary on intermediate appeal through the office of the Commissioner of Indian Affairs upon (1) the refusal of the Supervisor, United States Geological Survey, Roswell, New Mexico, to approve Petitioner's notice to drill within said strip of land; (2) the action of the Supervisor in approving a notice to drill filed by Phillips-Aztec; and (3) Petitioner's request for a determination of the north boundary of its leases.

Following the Secretary's final decision of November 8, 1961, Petitioner duly proceeded to seek court review thereof in the District Court for the District of Columbia. The jurisdiction of the District Court was invoked under Title XI, Section 306, Code of the District of Columbia; Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. § 1009); and the Declaratory Judgment Act (62 Stat. 964, 28 U.S.C. §§ 2201-2202).

REASONS FOR GRANTING THE WRIT

I.

The issue presented to the Secretary in this case was simply the construction of an oil and gas lease. The particular question was whether the lands leased were those described by metes and bounds or other lands referred to as the lands which would probably comprise the leased lands when surveyed. Petitioner was entitled to have this issue decided according to recognized legal standards. But this the Secretary did not do. Instead, the Secretary reviewed the proceedings of his subordinates in offering the lands for lease and preparing the form of lease and concluded that they intended to lease the lands on the basis of the "when surveyed" sections. Then, as a matter of administrative discretion, he decided that the lands covered by the lease were those that his subordinates intended to lease rather than those described in the lease.

In so proceeding the Secretary did not act in accordance with law as required by the Administrative Procedure Act.

The effect of the Secretary's conduct was to deprive petitioner of property without due process of law, because the area determined to be the leased premises by the Secretary, in the exercise of his administrative discretion, is substantially less than the area of the leases as described by metes and bounds.

The District Court, in ruling that the decision of the Secretary was in accordance with law, violated petitioner's constitutional rights and condoned the Secretary's unlawful exercise of administrative powers. The Court of Appeals in affirming, perpetuated the acquiescence of the court in this unlawful procedure.

Neither the District Court nor the Court of Appeals wrote an opinion, so we do not know what legal theory the court proceeded upon, if any, in upholding the Secretary. On the face of it the record suggests that the lower court proceeded on the assumption that the administrative powers of the Secretary are such as to permit him to disregard recognized legal standards, violate the constitutional rights of those having interests in land over which the Secretary has supervision, and to place him, the Secretary, above the law.

Although the Secretary in his opinion attempts to mask his determination in a legal facade, it is evident from the opinion itself that he exercised his discretion in deciding this controversy. For example, after discussing various provisions contained in the lease forms, the Secretary arrives at an astounding conclusion which he states as follows (Joint Appendix, p. 43):

> "When these conditions are given their full force and effect, it is seen that the contract has more elasticity than Continental appears to recognize."

The Secretary does not say who will determine the use of this "elasticity" but presumably this is to be left up to the sound discretion of the Secretary.

The Secretary's opinion makes reference to a number of things that occurred after the lease sale. With respect to the

meaning of these he reaches another amazing conclusion stated as follows (Joint Appendix, p. 45):

> "Having once asserted a boundary line and acted in accordance therewith to its benefit, it is difficult to see how Continental can later claim a different boundary, particularly when it is in conflict with boundaries recognized as having been established by other lessees and acted upon by them."

Among other things it is difficult to see how Continental was to benefit by the loss of approximately 300 acres of land.

It is also evident from the administrative record that the Secretary, in reaching his decision, exercised his decision-making function rather than his judicial function. For example, when this question first arose it was determined not on the basis of construction of the leases but on the basis of administrative intent. The General Superintendent, Navajo Indian Agency, in his letter of July 8, 1958 (Joint Appendix, p. 82) said:

> "It was the intent of this Agency and, we believe, of the Navajo Tribe that all leases in unsurveyed areas of Navajo Tribal lands would conform to the public land survey by section, township and range. * * *"

The meaning of a legal instrument cannot depend upon the secret intent of one of the parties.

The Commissioner of Indian Affairs, in his opinion of October 31, 1958, predicated his decision on this same claimed intent (Joint Appendix, p. 92):

> "The Intent at the time the tracts were advertised for sale, was to make boundaries conform to the United States public land surveys as required by 25 C.F.R. 186.8 * * *"

The Secretary in his opinion expressly relies on the foregoing comment (Joint Appendix, p. 42):

> "The Commissioner, in his decision, stressed the point that it was the intent of the leasing operation

to make boundaries conform to the United States public land surveys as required by 25 C.F.R. 171.8."

The Administrative Procedure Act clearly contemplates that recognized rules of law are to be applied in administrative adjudications. Contrary to contentions by the Secretary of the Interior, the Administrative Procedure Act applies to decisions of the Department of Interior in the same way that it applies to decisions of any other agency. *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966). This principle is even more appropriate in the present case because only the interests of Petitioner and Phillips-Aztec are affected. The lands involved are under lease to either Petitioner or Phillips-Aztec and neither the Navajo Tribe nor the United States has any interest in the subject matter of this controversy. When a controversy is between private parties and the decision does not affect the administrator's public trust, the judicial function of the administrator requires the highest degree of objectivity and adherence to established principles of law.

II.

When the Secretary submitted the administrative record to the District Court for review, the materials submitted included numerous interoffice memos and letters. The existence and content of these interoffice communications were not known to Petitioner prior to this time. Petitioner objected to inclusion of these materials but the court overruled the objection.

Many of these interoffice memos consisted of opinion and comment on this case by subordinates of the Secretary in the Department of the Interior. This Court has, on many occasions, held that due process is denied where an administrative decision is based, in whole or in part, on evidence acquired by a private investigation of the administrator and such evidence is not made known to the parties with opportunity for explanation and rebuttal. *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1936); *United States v. Baltimore & Ohio Southwestern*

Railroad Company, 226 U.S. 14 (1912); *Interstate Commerce Commission v. Louisville & Nashville Railroad Company*, 227 U.S. 88 (1912); *Crowell v. Benson*, 285 U.S. 22 (1931); *United States v. Abilene & S. R. Co.*, 265 U.S. 274 (1923); *United States v. Carlo Bianchi & Co.*, 373 U.S. 709 (1963).

There can be no question but that the Secretary gave credence to, and relied upon, the undisclosed and unproven material contained in these interoffice memos. In one instance the language in the Secretary's opinion is almost identical to, and was obviously borrowed from, one of these memos. In discussing the fact that the oil companies paid for the official survey, the opinion contains the following language (Joint Appendix, p. 42):

> "* * * and it was pointed out in the preliminary discussions that with the township boundaries established, any private or company surveyor could locate wells and lease tract boundaries within such township."

In one of the interoffice memos entitled "Statement of Facts" (Joint Appendix, p. 103) the following language appears (Joint Appendix, p. 104):

> "Mr. Peterson pointed out that any private surveyor or company surveyor could locate wells and the lease tract boundaries within a township. * * * *"

It is obvious that the Secretary accepted, without question, the so-called facts contained in these undisclosed memos.

It is reasonably clear that one theory relied on by the Secretary was that Petitioner and other operators in the area intended that the section survey would control by their actions in requesting and paying for the official survey. The above referred to Statement of Facts is actually an argument attempting to support that theory. For example, this document purports to quote passages of a letter from the Cadastral Engineer to the Chairman of the Navajo Indian Survey Committee pointing out some of the expected discrepancies under the proposed plan of survey between the sections and

the lease tracts as described in the lease sale (Joint Appendix, p. 105). Presumably the inference is that these anticipated discrepancies were clearly brought to the attention of the companies and there were no complaints. Of course the obvious defect and danger in relying on undisclosed evidence of this nature is that there is no proof, or even an allegation, that anyone except the chairman ever saw this letter. This is also true with respect to the quotations from the survey instructions set forth in this Statement of Facts (Joint Appendix, p. 107).

In reviewing an administrative decision under the Administrative Procedure Act, only the administrative record may be considered and new evidence may not be received. *National Labor Relations Board v. Newport News Shipbuilding & Dry Dock Company*, 308 U.S. 241 (1939); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1942).

Moreover, the administrative record to be reviewed must be a proper record. In *Norris & Hirshberg v. Securities and Exchange Commission*, 85 App. D.C. 268, 163 F.2d 689, 693 (1947), certiorari denied, 333 U.S. 867 (1948), the court defined the proper content of the record as follows:

> "In considering a case such as this the Commission might have before it four sorts of documents: the pleadings, a transcript of the evidence, briefs of counsel, and memoranda prepared by members or subordinates. It is well established that only the pleadings and the evidence constitute the record upon which the decision must be based. Briefs and memoranda made by the Commission or its staff, are not parts of the record. Our duty on appeal, being only to say whether the record justifies the order, is therefore only to examine the pleadings and the evidence. What may be said by counsel in their briefs, or by a Commissioner or a subordinate in a memorandum concerning the record, does not properly come before us."

To allow undisclosed interoffice memos to be included in the administrative record for review is equivalent to receiv-

ing new evidence and is a clear violation of the established procedures for court review.

In summary Petitioner contends:

(1) That the Secretary of the Interior, in rendering his decision in this case, did arbitrarily and capriciously fail to exercise his judicial function in conformity with the requirements of the Administrative Procedure Act.

(2) That the Secretary, in rendering his decision in this case, relied on evidence and facts which were not disclosed to the parties with opportunity for rebuttal.

(3) That the actions of the Secretary in this case deprived Petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

(4) That the District Court, in admitting the undisclosed interoffice memos into evidence, acted contrary to established procedures for review of an administrative decision under the Administrative Procedure Act, and in conflict with applicable decisions of this court.

(5) That the Circuit Court of Appeals, in confirming the judgment of the District Court without opinion, which had in turn confirmed the opinion of the Secretary without opinion, must be assumed to have adopted and approved the actions of the District Court and the opinion and actions of the Secretary.

(6) That the Circuit Court of Appeals, in approving the actions of the District Court and the Secretary of the Interior, has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure, as to call for an exercise of this court's power of supervision.

Respectfully submitted,

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